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BRIEF OF RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 106

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

No. 118

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES,
Petitioner,

vs.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTION PRESENTED

"Is the Regulation here on trial which was issued by the Denver Union Stock Yard Company (a public utility[1]) illegal on its face as a matter of law?"

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[1] *Stafford* vs. *Wallace*, 258 U. S. 495, 42 S. Ct. 397.

That is the only question. The Court of Appeals agreed[2].

Respondent restates the question, as the Rule permits, "where a respondent is dissatisfied with (its) presentation by the other side".[3] The two parties (Secretary of Agriculture and the Stock Yard Company) are not agreed between themselves. Their statements of the question differ. (Case No. 106, Page 3. Case No. 118, Page 7). But, in his petition for certiorari here, the Secretary agreed with Respondent. He said:

> "* * * the issue for decision is * * * but only the narrow question as to whether the Regulations are, as to matter of law, invalid on their face." Secretary's Petition, Page 9.

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[2]It said: "The Regulation is invalid upon its face and the case is accordingly remanded." Etc. 241 F. 2d 197.

[3]Rule 40(3).

STATEMENT (INTRODUCTORY)

In 1955 Denver Union Stock Yard Company announced:

> "If you engage in business at this stockyard, you cannot engage in business in the country, or elsewhere, in Colorado (except approximately the East one-sixth thereof designated by County lines and highways) other than to route livestock to us."

That, in effect, is what the Stock Yard Company declared in a "Tariff No. 14" May 11, 1955 filed with the Secretary of Agriculture and addressed to *Market Agencies* (firms like Respondent who buy and sell on commission) and *dealers* (who buy and sell on their own account) operating on the Denver stockyard.

A private company may, of course, prescribe at will the conditions on which it will deal with customers. It may deal or refuse to deal with anyone. Or, it may deal with only those who patronize it *exclusively*. It may refuse to deal with anyone who does business elsewhere.

But not so the Denver Union Stock Yard Company. It is a "public utility". This is because of the Packers & Stockyards Act, 1921, as construed by the courts, governing "posted" stockyards (stockyards which the Secretary of Agriculture has determined to be "public markets" and has posted notice thereat accordingly).

Our case is that simple. Respondent, a market agency, is a non-stock marketing association comprised of farmer-members throughout the Western States. It has operated for its members many years at the Denver stockyards, at other stockyards throughout the West and in the country. Now this Stock Yard Company proposes to forbid Respon-

dent (and like agencies) from doing business the country area noted under pain of being expelled from the stockyard if it does. Respondent is offered a "Hobson's choice": "Stay out of that country area or off of our yards"!

If the Stock Yard Company can make good here, will it next expand the forbidden area—nudge its boundaries little by little or all at once into other States or even all over America? Will it forbid trading everywhere except on its own yards? One stock yard company has already done so. The stockyard owners at Los Angeles, with incredible aplomb, have forbidden trading everywhere except upon their own yards. Their "tariff" was taken haec verba from the Denver tariff here except no limited forbidden area was contained. It proscribes off-yard trading *everywhere*. Issued May 25, 1955—two weeks after Denver's—the Los Angeles tariff was promptly challenged (like the Denver tariff here) in a complaint before the Secretary of Agriculture and the proceedings are pending the outcome here.[4]

This case is eagerly watched by the stockyard companies and livestock industry throughout the land. Will the pattern of livestock marketing continue as before (at least as it has since 1921 when the Packers & Stockyards Act was passed), the stockyards of this country "as great national public utilities"[5] in promoting the flow of livestock being required to go on serving the industry and the public whether or not those dealing on the yards also deal elsewhere? Are the grower members of this and other farmer-owned associations to be denied a market for their livestock, through their own

---

[4]*Producers Livestock Marketing Association* vs. *Los Angeles Union Stockyards Company*. U. S. Department of Agriculture. Packers & Stockyards Docket No. 2188:

[5]*Stafford* vs. *Wallace*, supra.

associations or chosen agencies, at the *stockyard* simply if the latter buy or sell or do business in the forbidden *country* —off-yard business? The answer must be given by this Court. It is of vast importance. Tradition is at stake. The issue is dramatic. We will literally see history in the livestock industry made before our eyes.

These pages are devoted to a showing that a regulation by a stockyard such as the Denver one, a public utility, which denies service to an agency simply for doing business elsewhere—in the country—is illegal upon its *face*. A public utility may not deny service to a customer for that reason. Such a regulation also is in restraint of trade and tends to *monopolize* trade or commerce in violation of the anti-trust laws. The Court of Appeals held the Regulation was invalid on its *face*. That holding was correct, as we shall see.

STATEMENT (POSTURE OF THE CASE)

The Stock Yard Company deprived *itself* of a hearing on the *facts* before the Secretary of Agriculture. Throughout the opposition briefs, it is charged that *Respondent* deprived the Stock Yard Company of a fact hearing by filing its "Election to Rest".[6] But, in response to Respondent's "Election to Rest", the Stock Yard Company then filed a Motion to Dismiss the complaint (R. 73). Thus, the case stood:

Respondent (Marketing Association)	Petitioner (Stock Yard Company)
Filed its "Election to Rest" (R. 72).	Filed its "Motion to Dismiss" (R. 73).
—This said the Regulation was illegal on its face as a matter of law; that Respondent would stand on that illegality as a matter of law; would not present evidence, such being unnecessary to determine the illegality as a matter of law, and that it thereby rested and submitted its case for final decision by the Secretary of Agriculture.	—This moved to dismiss the complaint with *prejudice* because of the Marketing Association's "failure" to sustain the burden of making a prima facie case "as evidenced by its election not to offer proof of its allegations" etc.

The Judicial Officer granted the Stock Yard Company's motion and dismissed the Market Agency's complaint.[7]

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[6]For example, American Stock Yard Company's brief, page 10, says: "Respondent's action (filing "Election to Rest") had the effect of preventing an evidentiary hearing". Same brief, see pp. 25, 30.

[7]The final order and decision of the Judicial Officer was "the complaint is dismissed" (R. 33).

The Stock Yard Company thus brought about the ruling appealed from, itself, i. e., the *dismissal*. It did this by filing its Motion for Dismissal.

The posture of the case became thus: the Market Agency (by its Election to Rest) submitted the case for decision on the Regulation's *invalidity* upon its face as a matter of *law*. The Stock Yard Company (by its Motion to Dismiss) submitted the case for decision on the Regulation's *validity* upon its face also as a matter of *law*. Both parties submitted the Regulation for a decision (without evidence) as to its validity or invalidity *as a matter of law upon its face*. Both thus conceded an evidentiary hearing was unnecessary. Neither wanted one. Whereas, the Stock Yard Company had previously answered, it then changed over and moved to dismiss. It next persuaded the Judicial Officer to grant its Motion to Dismiss. Naturally, it was pleased and willing to accept the dismissal it had brought about itself. But then the picture changed. The Court of Appeals reversed. It held the "Regulation is invalid upon its face" and the Stock Yard Company's Motion to Dismiss had been erroneously granted.

So, whereas the Stock Yard Company was most pleased to accept the favorable judgment made by the Department of Agriculture upon its Motion to Dismiss without a fact hearing, it now wants to reject the unfavorable judgment made by the Court of Appeals upon its Motion to Dismiss without a fact hearing.

The posture of the case remains unchanged throughout. Posture was fashioned by the parties in the proceeding before the Secretary. That posture—resulting by an election to rest and a motion to dismiss—carried over on appeal to the

Court of Appeals and carries over on appeal to the Supreme Court. It did not—could not—change along the way. The die was cast below. The posture of the case is immutable. Having put the case in posture before the Department of Agriculture, the Stock Yard Company must accept its own self-made posture throughout. Now is too late to argue for a fact hearing. The Stock Yard Company contended by its Motion to Dismiss that none was necessary—that the Regulation's validity could be determined as a matter of law upon its face. It cannot contend to the contrary on appeal.

The Stock Yard Company deprived itself of a fact hearing.

STATEMENT (CONCLUDED)

Denver Union Stock Yard Company owns and operates the Denver Union Stockyards, a "posted" stockyard under the Packers & Stockyards Act, 1921 (R. 11, 39). 7 U. S. C. A. §202. It is thus a "stockyard owner" under the Act. 7 U. S. C. A. §201.

Respondent, Producers Livestock Marketing Association, is a "market agency" as defined by the Act. Market agency means any person engaged in buying or selling in commerce at a stockyard upon commission basis (a commission firm) or furnishing stockyard services. 7 U. S. C. A. §201. Respondent has operated for many years on the Denver Stockyards, at other stockyards in the West, and also buys and sells in the country for livestock growers (R. 40).

The Packers & Stockyards Act, 1921, provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. * * *" 7 U. S. C. A. §205.

And:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. A. §208.

Thus, the Stock Yard Company is commanded to (1) furnish stockyard services at its stockyard without discrimination, and, (2) establish and observe nondiscriminatory

regulations and practices, discriminatory regulations being denounced as unlawful.

Nevertheless, the stockyard owners, on May 11, 1955, issued the following Regulation 10(c) contained in their "Tariff No. 14". (R. 39, 12):

"Item 10.

"Interference With Operations

"(a) * * *

"(b) * * *

"(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

"(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

"(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stockyard; or

"(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

" 'The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the State of Colorado except that part listed as follows:

" 'The area lying East of the line beginning with the Westerly boundary of the County of Sedgwick where it intersects the Nebraska State line; thence South along the County line of

Sedgwick and Phillips Counties; thence West and South along the Western boundary of Yuma County to its intersection with U. S. Highway 36; thence West to Cope and South along Colorado Highway 59 to Eads, Colorado; thence Westerly along Highway 96 to Ordway; thence South on Highway 71 to Timpas; thence Southwesterly via Highway 350 to Trinidad; thence South to New Mexico State line.

" 'The provisions of Paragraph (c) do not apply on livestock solely used for breeding purposes.' "

The Regulation bars all market agencies (including Respondent) and others who are admitted on the Denver Stockyards from soliciting or doing business or trading at all within the *forbidden* country area noted (except to route livestock to the Denver Stockyard). It shows the gimlet eye of this stockyard owner to be squarely focused on all livestock traded or moving to market in that country area. It says those firms who handle livestock in that area must see that all stock handled by them therein moves to the Denver Stockyard or they must get off that stockyard and stay off. It meant, of course, that pending a judicial determination of Denver's right to issue the incredible rule, Respondent and others who had been admitted for years on the Denver Yard must discontinue their country sales and operations in the forbidden area (except to ship to Denver) or be *expelled* from the stockyard.

But Respondent refused to concede the Yard owners' right to *force* through their stockyards all livestock handled in the forbidden area by it and other market agencies and dealers. The stockyard is a public utility. It could not condition service to customers (including Respondent) on their

exclusive patronage. Public service companies may not demand that. Furthermore, the demand smacked of *monopoly* and restraint of trade.

So Respondent challenged the Regulation and filed a complaint with the Secretary of Agriculture July 7, 1955 (R. 39). Therein, Respondent, set forth the Regulation, explained that Respondent was a market agency, had operated for years on the Denver Stockyards, at other stockyards throughout the West and in the country, buying and selling for livestock growers; that the stockyard was a public utility under the Packers & Stockyards Act and required to furnish stockyard service without discrimination; that the Regulation was discriminatory and should be set aside as unlawful. The complaint went on to point out that the demand of the Regulation was no different than that of:

> —A railroad which would deny service to a shipper who also shipped by truck.
>
> —An airline which would deny service to passengers who also travel by rail.
>
> —A power company which would deny service to one who also uses gas.
>
> —A water company which would deny service to one who also receives water from a spring or purchases bottled water from another supplier * * * etc., etc. (R. 40, 41).

The complaint also explained that Respondent was a non-stock association comprised of members only, membership extending to growers throughout eleven Western States; it pointed out the Regulation forbade Respondent's buying, selling or taking consignments of livestock in the forbidden country area except for movement to the Denver Stock-

yards, or furnishing market advice to growers in the area other than to ship to the Denver yards—and no place else (R. 41). The complaint concluded with the request that the Regulation be set aside and annulled (R. 42).

The Stock Yard Company answered, defending the validity of the Regulation, asserting its right to so regulate and giving various reasons claimed to support its position (R. 44). A "Hearing Examiner" made an "Interim Ruling" December 6, 1955, saying he thought the problem required a hearing on "the facts". He set the matter for hearing (R. 70). To Respondent, however, the question was solely one of law. It elected to stand upon the Regulation's illegality as a matter of law. Therefore, it filed its "Election to Rest" (R. 72). This stated Respondent's position (1) that the Regulation was illegal and invalid on its *face* as a matter of law, (2) that Respondent elected to stand upon the illegality of the Regulation as a matter of law, and (3) would present no evidence, such being wholly unnecessary to determine the illegality of said Regulation as a matter of law, and, (4) wherefore, Respondent thereby rested and submitted its case for decision accordingly.

The Stock Yard Company filed a "Motion to Dismiss" for Respondent's failure to "sustain the burden of making a prima facie case as evidenced by its election not to offer any proof" (R. 73). The Hearing Officer *conceded* an oral hearing was no longer necessary.[8] But he thought the proceeding should be dismissed as demanded and certified the same to the "Judicial Officer" for decision, recommending dismissal.

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[8]His certification to the Judicial Officer said: "The oral hearing set for January 24, 1956 now seems unnecessary, and will not be held" (R. 73).

Briefs and argument followed. The decision and order of the Secretary of Agriculture was entered June 19, 1956 by the Judicial Officer acting for and on behalf of the Secretary. His decision and order was that the Regulation was not illegal upon its *face* and the complaint was dismissed. The Court of Appeals reversed (R. 77). Its decision is here for review.

The decision of the Judicial Officer was erroneous and that of the Court of Appeals is correct. The Appeals Court (quoting from a similar decision by the Tennessee Supreme Court)[9] held the Act did not require Respondent to do *all* of its marketing at the stockyard or prohibit Respondent from shipping livestock elsewhere. It ruled the Regulation invalid as a matter of law *upon its face.*

As we shall see, Denver Union Stock Yard Company, a public utility, may not demand that its customers (including Respondent) refrain from doing business elsewhere (except to ship to Denver) as a condition to receiving service on its stockyards. And such a regulation is in restraint of trade and tends to *monopolize* trade or commerce in violation of the Anti-Trust Laws.

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[9](R. 83—241 F. 2d 197). The Tennessee quotation: "Furthermore, we fail to find anything in the Packers & Stockyards Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises, or from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the Act which requires * * * the defendants to do all their business with complainant. * * *" *Nashville Union Stockyards* vs. *Grissim*, 153 Tenn. 225, 280 S. W. 1019.

SUMMARY OF ARGUMENT

1. Denver Union Stock Yard Company is a public utility because of the Federal Packers & Stockyards Act, 1921, requiring "posted" stockyards (like Denver's) to furnish "stockyard services without discrimination" and to observe "non-discriminatory regulations and practices" and denouncing non-observance as "prohibited and unlawful". 7 U. S. C. A. §205, 208. *Stafford* vs. *Wallace*, 258 U. S. 495, 42 S. Ct. 397, 23 A. L. R. 229.

2. The Stock Yard Company, as a public utility, is under legal duty to furnish stockyard services to Respondent and others without discrimination. This is so by the common law, as well as the Act itself.

3. The Stock Yard Regulation is illegal for demanding exclusive patronage of Respondent and other "market agencies" and "dealers" as a condition to furnishing them stockyard services. Public utilities may not demand exclusive patronage. An airline may not refuse service to one who travels by rail. A public power company may not deny service to one who also uses gas. A public water company may not deny water to one who also receives water from an adjacent spring, etc. Public utilities may not demand exclusive patronage. Yet this Regulation demands that all commission firms who do business at the Denver stockyard do all of their marketing of Colorado livestock (except livestock from the East one-sixth of Colorado) at the Denver yard. Such agencies may not buy or sell Colorado livestock elsewhere or they will be expelled from the Denver yard. The law is well settled that a public utility may not demand exclusive patronage. The demand renders the Regulation invalid.

4. The Regulation is illegal for denying Respondent and other agencies stockyard services because of their country operations—a collateral matter. It is well settled that public utilities may not refuse service because of a collateral matter not related to the service. Buying and selling livestock for members and customers away from the Denver stockyard by Respondent and others is collateral to, and has nothing to do with, their so doing at the Denver yard.

5. The Regulation is monopolistic and, therefore, invalid. This is both by the Sherman Act (15 U. S. C. A. §2) and the decisions of the Colorado Supreme Court. The Regulation is an attempt by the Stock Yard Company to *monopolize* the marketing of all livestock in Colorado (except the East one-sixth) and to *force* all such livestock through the Denver stockyard or gather *tribute* thereon.

6. The Regulation is invalid on its face. Its exclusive patronage demand, its refusal to furnish stockyard services to those agencies who deal elsewhere in Colorado livestock—a collateral matter, and its attempt to *monopolize* the marketing of all such livestock appear upon the *face* of the Regulation.

7. Since the Regulation is invalid on its face, "full hearing" required no evidence. Both parties submitted the Regulation for hearing before the Secretary of Agriculture upon its *face*. Respondent filed its "Election to Rest", saying therein the Regulation was invalid on its face. The Stock Yard Company then filed its "Motion to Dismiss", demanding dismissal of Respondent's complaint (to set aside the Regulation) because of Respondent's having elected to rest and failed to sustain the burden of "making a prima facie case" (R. 72, 73). Both sides thus submitted the Regulation

for decision in that posture—the validity or invalidity of the Regulation upon its face as a matter of law. The Secretary's Hearing Examiner concurred in that view. He said, "The oral hearing set for January 24, 1956 now seems unnecessary, and will not be held" (R. 73). Arguments and briefs by the parties (and Amicus Curaie) were heard and filed. The issues of law were fully argued on both sides and heard and determined by the Secretary. This constituted "full hearing", as the Court of Appeals properly decided.

8. As shown by brief of Amicus Curaie (American Stock Yards Association), over 40 percent of all livestock are now marketed in the country—away from a stockyard, as compared to 10 percent when the Packers & Stockyards Act was passed in 1921. The Regulation is simply an attempt to regulate against that economic fact and force back through the Denver stockyard that portion of said 40 percent which is now lost to it through country sales.

9. The Stock Yard Company's authorities do not support its claimed right to proscribe off-yard operations away from the stockyard by agencies which operate on its yards. The Fort Worth and Sioux City cases cited were simply examples of the right to regulate against offending activities (traffic jams and accosting drive-in loads) on the Fort Worth yard and the right of the Secretary of Agriculture to demand access to a "dealer's" records of cattle purchased *at* the Sioux City stockyard, notwithstanding the dealer's asserted transfer "by himself to himself" into a "special account" of the livestock; his so-called "special account" ordinarily covering livestock purchased in the country.

10. Alleged regulations at other stockyards are unlike the Denver one. Those regulations are not in the Record

but are *dehors*. Only *selected* portions of the alleged regu lations appear and are shown in the brief of Amicus Cura (American Stock Yards Association) who has journeyed fa afield of the Record. Those selected portions proscribe ac tivities only on the stockyard property or approaches. The do not attempt to proscribe activities in the country—awa from the stockyards—except for Los Angeles, Houston an Baltimore, perhaps, which were adopted after Denver's an were apparently inspired thereby.

11. The presence and position of the Secretary of Ag riculture here is anomalous. He was only the *forum* or *tri bunal* in the beginning. He was a party in the Court o Appeals *solely* because of a Rule of that Court (no statute requiring "the agency or officer concerned" to be name as a party-respondent on appeal. He is only a nominal party The real parties in interest are Respondent (complainan before the Secretary of Agriculture) and the Stock Yar Company (respondent before the Secretary of Agriculture) The Secretary did not make or issue the Regulation. Th Stock Yard Company did. The Secretary here is precisel in the position of a trial judge entering an appeal to argu for his decision made upon the trial.

ARGUMENT

1.

DENVER UNION STOCKYARD COMPANY IS A PUBLIC UTILITY.

The Packers & Stockyards Act, 1921 provides:

> "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. * * *" 7 U. S. C. A. §205.

And:

> "It shall be the duty of every stockyard owner and market agency to establish, observe and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." 7 U. S. C. A. §208.

The Act went into effect August 15, 1921. It was tested forthwith for its constitutionality. The Supreme Court quickly upheld it May 1, 1922. *Stafford* vs. *Wallace*, 258 U. S. 495. 42 S. Ct. 397; 23 A. L. R. 229. Construing the Act, the Supreme Court held the stockyards are "great national public utilities":

> "The act, therefore, treats the various stockyards of the country as great national public utilities to promote the flow of commerce from the ranges and farms of the West to the consumers in the East. It assumes that they conduct a business affected by a public use of a national character and subject to national regulation. That it is a business within the power of regulation by legislative action needs no discussion." 42 S. Ct. 402.

The Supreme Court's pronouncement settled the public-utility character of the stockyards once and for all. State and Federal courts abide:

Birmingham vs. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39, 2 A. L. R. 2d 1108. Cert. Den. 68 S. Ct. 151:

> "It may be here said that the specific provisions of the Act substantially accord with the common law rule applicable to public utilities in general."

Kirk vs. *St. Joseph Stockyards Company*, 8 Cir. 206 F. 2d 283, 40 A. L. R. 2d 981:

> "Defendant as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe, and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers and Stockyards Act of 1921, 7 U. S. C. A. §201 et seq."

50 Am. Jur., Stockyards, §4 (Supp.):

> "The duties imposed by the Federal Packers and Stockyards Act upon stockyard owners and marketing agencies are substantially in accord with the common law applicable to public utilities in general."

Market agencies (and Respondent is a market agency) are public utilities no less than the stockyards, for the obligation to furnish stockyard services "without discrimination" and to establish and observe "non-discriminatory regulations" is fixed upon "every stockyard owner *and* market agency" under the Act. 7 U. S. C. A. §205, §208.

Thus, Respondent and other market agencies, as public utilities, are under legal obligation to sell and handle livestock

on commission, consignment, etc., and to render their required services impartially and without discrimination to all who desire those services.[10] In fact, the juristic concept that they are public utilities enlivened judges in some instances in the past to actually decide that the market agencies are so irrefutably bound by the Act to handle livestock offered them for sale that they will be absolved from answering to the true owner or a mortgagee for selling stolen or mortgaged animals.

Blackwell vs. *Laird* (Mo.) 163 S. W. 91.

Sullivan vs. *Wells* (D. C. Neb.) 89 F. Supp. 317.

Montana Meat Company vs. *Missoula Livestock Auction Company* (Mont.) 230 P. 2d 955.

But that startling idea has been repudiated by the overwhelming majority of the courts in decisions like those below which concede that market agencies are public utilities but acknowledge their right nevertheless to reject stolen, mortgaged or other livestock wrongfully offered and hold them liable accordingly.

Birmingham vs. *Rice Bros.*, supra.

Citizens State Bank vs. *Farmers Union Livestock Coop.* (Kan.) 193 P. 2d 636.

Mason City Production Credit Assn. vs. *Sig Ellingson Company* (Minn.) 286 N. W. 713.

First National Bank vs. *Siman* (S. D.) 289 N. W. 416.

Moderie vs. *Schmidt* (Wash.) 108 P. 2d 331.

Walker vs. *Caviness* (Tex.) 256 S. W. 2d 880.

Kelly vs. *Lang* (N. D.) 62 N. W. 2d 770.

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[10]The obligation of a public utility exists as a part of the common law irrespective of statute. 43 Am. Jur., Public Utilities, Etc., §22.

Allen C. Driver, Inc. vs. *Wells* (Md.) 86 A. 2d 724.

Seymour vs. *Austin* (D. C. Ore.) 101 F. Supp. 915.

Johnson vs. *Robinson* (5 Cir.) 203 F. 2d 135.

Sig Ellingson Company vs. *Butenbach* (8 Cir.) 199 F. 2d 679. Cert. Den. 73 S. Ct. 505.

Respondent's complaint to the Secretary alleged (R. 40):

> "Denver Union Stockyards is in fact a public utility under the Act, required to furnish reasonable service 'without discrimination' and to 'establish, observe, and enforce just, reasonable and non-discriminatory regulations and practices * * .* (and) every unjust, unreasonable or discriminatory practice is prohibited and declared to be unlawful." 7 U. S. C. A. §205. §208.

The Secretary declared in his Finding No. 1 that Denver Union Stockyard was:

> "A stockyard posted as subject to the Act" (R. 11).

He referred in his Conclusions to the public-utility character of the stockyards thus:

> "A stockyard company is no doubt a public service company" (R. 27).

Denver Union Stockyard Company is a public utility under the Packers & Stockyards Act as construed by the courts. As such, it is under legal duty to serve Respondent and all market agencies and dealers at its stockyards, impartially and without discrimination, as we will now see.

2.

DENVER UNION STOCKYARD COMPANY AS A PUBLIC UTILITY UNDER THE ACT IS UNDER LEGAL DUTY TO FURNISH STOCKYARD SERVICES TO RESPONDENT AND OTHERS WITHOUT DISCRIMINATION.

43 Am. Jur. Public Utilities §22:

> "The primary duty of a public utility is to serve on reasonable terms all those who desire the service it renders * * * the public utility is under a legal obligation to render adequate and reasonably efficient service impartially, without unjust discrimination * * * to all members of the public to whom its public use and scope of operation extend who apply for such service and comply with the reasonable rules and regulations of the public utility."

The duty to serve is a common law obligation aside from statute:

> "This obligation is one implied at common law and need not be expressed by statute or contract, or in the charter of the public utility." Id.

C. J. S. says:

> "This duty exists independently of statutes regulating the manner in which it shall do business or of contracts with municipalities or individuals, and is imposed because the utility is organized to do business affected with a *public interest* and holds itself out to the public as being willing to serve all members thereof * * * statutes providing affirmatively therefor are merely declaratory of the common law." 73 C. J. S. Public Utilities §7.

The Supreme Court, remember, recognized the stockyard business was affected with a public interest under the Act:

> "The Act, therefore, treats the various stockyards of the country as great national public utilities * * * It assumes that they conduct a business affected by a public use of a national character and subject to national regulation * * *" *Stafford* vs. *Wallace*, 42 S. Ct. 397, 402.

Stockyard companies are just like other public utilities as regards their duty to serve. Here is a statement by the Eighth Circuit judges in *Kirk* vs. *St. Joseph Stockyards Company*, 206 F. 2d 283:

> "Defendant as the owner and operator of a commercial stockyard which was a public utility subject to reasonable regulations, had the duty of furnishing, upon reasonable request, without discrimination, reasonable stockyard service and to establish, observe and enforce just, reasonable and non-discriminatory regulations and practices in respect to the furnishing of stockyard service. Packers and Stockyards Act of 1921, 7 U. S. C. A. §201 et seq."

Being a public utility, Denver Union Stockyard Company must furnish stockyard services to Respondent and other market agencies and dealers.

3.

THE STOCKYARD COMPANY'S REGULATION IS ILLEGAL FOR DEMANDING EXCLUSIVE PATRONAGE BY RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS AS A CONDITION TO FURNISHING THEM STOCKYARD SERVICES. PUBLIC UTILITIES MAY NOT DEMAND EXCLUSIVE PATRONAGE.

> "Furthermore, we fail to find anything in the Packer's and Stockyard's Act that requires defendant or his employer to transact all of their business of receiving, buying and selling livestock on complainant's premises (stockyard) *or* from buying livestock and causing the same to be shipped to others than complainant. In other words, there is nothing in the act which requires * * * the defendant to do *all* their business with complainant * * *."[11] (Italics added.)

That was the Supreme Court of Tennessee speaking. *Nashville Union Stockyards vs. Grissim* (Tenn.) 153 Tenn. 225, 280 S. W. 1015. How like our own case! The Nashville Stockyard Company sued to enjoin a commission man from going on the yards. The complaint charged he was doing things "hurtful" to the stockyard company's business by "diverting"[12] business from its stockyards to other yards and shipping "to points other than Nashville"; or if he shipped to Nashville, doing so in a way the Yard Company was "denied" the right to handle the shipment.

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[11]The Court of Appeals below approved and quoted this statement of the Tennessee Supreme Court (R. 83. 241 F. 2d 197).

[12]Denver's regulation here uses the same language. It says no market agency, etc. may "*divert* or attempt to *divert* livestock from this market" (R. 39, 12.) P. 10 Supra.

The case was heard and decided on the pleadings (and a motion to dissolve a preliminary injunction). The complaint was dismissed by the trial court as being "without equity". In other words, the stockyard owner's attempt to bar the commission agent because he did business elsewhere was held illegal *as a matter of law upon its face.*[18] The Tennessee Court said also:

> "By §301(a) of the Act complainant is defined as a stockyard owner. By §304 of said Act it is made the duty of complainant to furnish to those engaged in shipping, buying, selling and handling livestock on its premises (stockyard) upon reasonable request, without discrimination, reasonable stockyard services. This is a duty which the Act imposes upon complainant, which it is bound to perform, and this is true as to all shippers, buyers, sellers and handlers of livestock on and through its premises. To this extent it is a public corporation and these duties cannot be disregarded."

As the decision showed, the Packers and Stockyards Act does not require one like petitioner (a Market Agency) to do all of its business on or through a stockyard. But the Denver Regulation does. What the Nashville stockyard owner was denied under the Act, the Denver owner proposes to accomplish nevertheless by his own regulation.

But demands by public utilities that their customers refrain from patronizing others or using other products or facilities have uniformly been stricken down as illegal. Such demands violate the very concept underlying the relation of

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[18] Here likewise the petitioner rested its case upon the validity of the Denver regulation as shown "upon its face as a matter of law" (R. 72).

such companies to the public: the duty to provide service without discrimination."[1]

Strathie vs. *Buck County El. Co.* P. U. R. 1920-D, p. 290. A druggist installed his own small lighting system using the power company's electricity only when necessary. *Regulation*: "The customer will not use on the above premises any electricity except that furnished by the company". *Decision*:

> "* * * a rule which requires a customer not to use any electricity except that furnished by the utility is unjust and unreasonable * * * it cannot refuse its service simply because the customer does not purchase all of his electricity from it."

Re: Union Light and Power Co. P. U. R. 1932-B, p. 1. *Regulation*: Steam for heating will be denied those who do not also buy the company's electricity. Interestingly, the excuse given was that the regulation was to prevent "further raids" on its business by a rival company. *Decision*: The regulation was invalid as permitting the utility to:

> "* * * thus discriminate in its services in favor of the class of persons who take its electric service as against the class of persons who do not take that service."

State vs. *Citizen's Tel. Co.* (S. C.) 39 S. E. 257. Local telephone company removed and cut off storekeeper's telephone on discovering that he was also using Southern Bell Telephone Company's service. *Regulation*: Customer will use local telephone service exclusively. *Decision*: Regulation invalid.

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[1] 43 Am. Jur., Public Utilities, §22. That concept pervades the Act. "It shall be the duty of every stockyard owner * * * to furnish * * * without discrimination * * * stockyards services * * *" 7 U. S. C. A. §205.

Nacogdoches Light & P. Co. vs. *Thomas* (Tex. C. A.) 138 S. W. 1080. Merchant used both electric power from power company and also his own gas in lighting his store. *Regulation*: Persons using power company's electricity for lighting must use no other kind of lights. *Decision*: Regulation invalid.

> "* * * Appellant had a * * * rule that persons using its lights must use no other kind of lights and claimed that appellee had violated this rule by putting in the system of gas lighting. * * * The effect of this rule if enforced can easily be seen * * * to drive one or the other of the systems out of business and to give the one remaining a *monopoly*. * * * If appellant had the right to impose this condition as to the use of gas it would have equally the right to impose it as to the use of kerosene lamps or candles and thus compel all of its customers to use its lights alone or do without its service entirely. Such a rule or regulation is *on its face unreasonable* and could not be enforced." (Italics added.)

People vs. *Pub. Service Com.* 148 N. Y. S. 583. Customer received electric power in day time from private plant next door. He operated large refrigerating system. He wanted electricty from power company at night only, but was refused. *Regulation*: "No other electric service introduced or permitted in connection with the equipment". *Decision*: Regulation invalid as arbitrary attempt to monopolize and contrary to public policy.

> "It is of course the rule that such a corporation may establish reasonable regulations respecting the use of the service which it proposes to furnish. * * * In our opinion, however, the requirement that a consumer must take all of its electricity from one company, or receive none at all, is not in any proper sense a regulation respecting the use of its service, but is a

purely arbitrary attempt on the part of the company to insure itself a *monopoly* of furnishing electrical current.

"* * * the restrictive clause which it insists on inserting in its contracts * * * is contrary to public policy and invalid and constitutes in no proper sense a reasonable regulation respecting the use of the service. * * *". (Italics added.)

Coombs vs. *Burk* (Cal. App.) 180 P. 59. Suit by Los Angeles Gas Company to recover money on contract. *Regulation*: The contract contained a provision requiring customer to buy gas range and equipment on loan from the gas company if customer quit using company's gas. *Decision*: Contract illegal. *Note*: *The* decision was that the complaint showed the illegality *as a matter of law upon its face.*

" 'Whatever tends to prevent competition in business impressed with a public character is opposed to public policy and is therefore unlawful. Greenhood on Public Policy, p. 180.'

"Where a contract affects such character of business, since no restraint, however partial, can be tolerated, the court will not inquire into or consider the extent of the restriction imposed. *Gibbs* vs. *Consolidated Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; *West Va. T. Co.* vs. *Ohio R. P. L. Co.*, 22 W. Va. 600, 46 Am. Rep. 527; *Gwynn* vs. *Telephone Co.*, 69 S. C. 434, 48 S. E. 460, 67 L. R. A. 111, 104 Am. St. Rep. 819; *Salt Co.* vs. *Guthrie*, 35 Ohio St. 672."

The rule is different as to private businesses:

"As to private business, the conduct of which does not affect the public welfare, and hence involves no question of public policy, a different rule applies, under which contracts, if reasonable in their terms, will be enforced."

The opinion concludes:

> "Concededly in the instant case the Gas Corporation was engaged in a business impressed with a public character (*Gibbs* vs. *Cons. Gas Co.*, supra), *and from a reading of the contract it is apparent* that its purpose in making the same was to prevent defendant from discontinuing the use of gas furnished by it, and in lieu thereof, obtaining a supply from another company engaged in supplying gas to the inhabitants of the city. That the contract was not only in *restraint of trade*, but if upheld would tend to *stifle competition* and give plaintiff's assignor a *monopoly* of the business of furnishing a supply of gas in the city, and hence be *detrimental* to the public welfare, admits of no controversy." (Italics added.)

Denver Union Stock Yard Company (a public utility) may not demand the exclusive patronage of Respondent and other market agencies and dealers as a condition to furnishing them services at the stockyard. Its Regulation is void for such demand.

4.

THE STOCKYARD COMPANY'S REGULATION DENYING RESPONDENT AND OTHER MARKET AGENCIES AND DEALERS STOCKYARD SERVICES BECAUSE OF THEIR COUNTRY OPERATIONS — A COLLATERAL MATTER — IS ILLEGAL. PUBLIC UTILITIES MAY NOT REFUSE SERVICE BECAUSE OF A COLLATERAL MATTER NOT RELATED TO THE SERVICE.

Item 10c of the incredible regulation at bar provides that no market agency (including Respondent) or dealer admitted on the Denver Stockyard shall "upon the company property *or elsewhere*" (R. 39, 12):

> "(1) Solicit any business for *other markets*, for sale at *country points*, or endeavor to secure customers to buy or sell *elsewhere*.
>
> "(2) Divert livestock otherwise 'normally' coming thereto, away from the Denver stockyard.
>
> "(3) Interfere with the 'normal flow' of livestock to the Denver stockyard.
>
> "Then comes a description by county boundaries and highways of the country area to which the prohibitory terms of item 10c apply (approximately five-sixths of Colorado)."

In other words, the effect of the Regulation is: If you do business at our stockyard you may not do business in the forbidden country area (except of course to route livestock to our stockyard). Conversely stated: Unless you stay out of this country area (except to route business to us) you must get off of our yards and stay off.

The authorities everywhere hold that a public utility may not withhold or refuse its service to a customer because of a *collateral matter* not related to that service:

> "The decisions are generally in accord in holding that a public utility corporation cannot refuse to render the service which it is authorized by its charter to furnish, because of some collateral matter not related to that service." 43 Am. Jur., Public Utilities §23.

To the same effect, see 73 C. J. S. Public Utilities §7. 55 A. L. R. 771, note.

The denial of the regulation here is based squarely on a collateral matter. The services which the Denver company is under duty "to furnish" are "stockyard services". 7 U. S. C. A. §205. The *basis* of its denial of those services is something else—entirely apart: Country sales and dealings (off-yard transactions) by its customers. *The services*: "Stockyard services". The *collateral matter*: Dealing in the country area proscribed.[15]

Garner vs. *City of Aurora* (Neb.) 30 N. W. 2d 917. City furnished both water and garbage collection. City Ordinance provided water would be cut off for non-payment of garbage fee. *The service*: Furnishing city water. *Collateral matter*: Non-payment of garbage fee. The Regulation was held invalid:

> "The authorities are uniform to the effect that a public service corporation cannot refuse to furnish its public service because the patron is in arrears with it on account of some collateral or independent transaction not strictly connected with the particular

[15]This is aside from the Regulation's demand of exclusive patronage by its customers. Exclusive patronage demands by a public utility are illegal as already shown. P. 25 supra.

physical service. For instance, electric companies frequently sell electric stoves, refrigerators and the like. Such a company cannot cut off electric service because the patron is in default in the payment of a bill of that description * * *." (Quoting from *Thomas* vs. *Miss. Power & L. Co.*, 652 So. 169, 271.)

Vandenberg vs. *Kansas City Gas Co.* (Mo.) 105 S. W. 17. Held: Gas Company could not legally refuse to furnish gas to a woman unless she would pay her husband's delinquent gas bill at another property. *The service*: Furnishing gas. *Collateral matter*: Husband's delinquent gas bill at other premises.

Ashline vs. *Pub. El. L. Co.* (Vt.) 44A. 2d 164. Held: Power Company could not cut off electricity because customer refused to pay repair bill on electric refrigerator. *The service*: Electricity. *Collateral matter*: Non-payment of refrigerator repair bill. The court said:

> "* * * there is nothing in the statute directly or by implication that gives such public service corporations a right to refuse to furnish electric service to a customer in its territory because the customer is refusing to pay a bill for some collateral service such as repairing an electric refrigerator * * * Such is the law in this state and also other jurisdictions adding to the great weight of authority."

South Florida Railroad Co. vs. *Rhoads* (Fla.) 5 So. 633. The Railroad Company's rule prohibited employees of a competing steamship line from wearing caps and badges of the rival steamship company on the Railroad Company's trains. The employees actually solicited business for the steamship line on the railroad company's trains. *The service*: Railroad transportation. *Collateral matter*: wearing cap and badge

of a competitor while riding on the railroad train. The rule was held invalid. The head note reads:

> "A rule adopted by a railroad company which inhibited passengers on their trains from wearing the uniform cap of a line of steamers running in opposition to a line of steamers in connection with the company was not reasonable, and hence not binding on the public."

Furthermore, the illegality, the decision said, was strictly a matter of law:

> "The reasonableness of rules prescribed by railroad companies, and like corporations, with like powers, is a question of *law* to be decided by the courts and not a question of fact to be decided by juries." (Citing authorities.)

Ten Brock vs. *Miller* (Mich.) 216 N. W. 385. 55 A. L. R. 768. A resort company refused water and light to a customer unless he would install a septic tank. He refused. *The service*: Water and electricity. *Collateral matter*: Installation of septic tank. Held: Regulation was invalid:

> "The installing of a septic tank was purely a collateral matter, and had no relation to the duty of defendant company to furnish the light and water and receive its pay therefor."

Seaton Mtn. El. etc. Co. vs. *Idaho Springs Inv. Co.* (Colo.) 111 P. 834. An electric company's regulation refused steam for heating to those who did not also use its electricity. *The service*: Steam heat. *Collateral matter*: Purchase of electricity. Held: The regulation was invalid.

Miller vs. *Roswell Gas. & E. Co.* (N. M.) 166 P. 1177. Held, that a power company could not cut off electricity

from a customer's house because the customer's employee who signed the service contract for the customer owed an unpaid bill for wiring his own house—an entirely collateral matter.

See also *State* vs. *Butte E. & P. Co.* (Mont.) 115 P. 44. There the holding was that a power company could not refuse electricity to a customer for his alleged non-payment of gas charged to have been taken unlawfully by him.

Denial of stockyard services here is grounded by this arbitrary regulation entirely on a collateral matter having no connection with such services at all: Off-yard dealing in the country (without routing the business to the Denver stockyard.). That is wholly a collateral matter, just as much as those matters which were asserted to justify denial in the decisions above.

If Respondent, a Market Agency, undertakes to buy, sell or market for its many farmer-members (or other growers) livestock in the forbidden area it can do but one thing in that area: Ship to the Denver stockyard. Otherwise it will be expelled from that yard. It cannot ship to any other stockyard, for example, Oklahoma City, Omaha, Kansas City, St. Joseph or Chicago, even though it may do better price-wise for its members or patrons at those other markets. It cannot even sell livestock of one grower directly to another in that area. It must ship to Denver and back again to do so —a ludicrous process, to be sure, but one literally demanded by this shocking regulation. Respondent and other market agencies and dealers must, if the regulation be upheld, decide forever to stay with the stockyard and forego their country business in the area proscribed (other than shipping to Denver) or abandon the stockyard and work only in that coun-

try. If they stay with the stockyard they may not do business in that country area. On the other hand if they stay with the country area they may not receive or handle livestock therefrom at the Denver yard—for they will be expelled for selecting the country over the stockyard. But what of the Packers and Stockyards Act? It says the Denver stockyard owner must furnish stockyard service "without discrimination" and that "every unjust, unreasonable or discriminatory regulation and practice" is unlawful. But in the face of that statutory interdiction Respondent and those others will be denied service at the Denver yard regardless. Such "unjust, unreasonable and discriminatory" result was never intended by the Act. It was designed:

> "* * * to secure to patrons of stockyards the prescribed stockyard services at just and reasonable rates." *U. S.* vs. *Morgan*, 307 U. S. 183, 59 S. Ct. 795.

This Regulation flouts the very purpose of the Act.

5.

THE STOCKYARD COMPANY'S REGULATION IS MONOPOLISTIC AND THEREFORE ILLEGAL.

36 Am. Jur., Monopolies §3 says:

> "Monopolies in trade or business in this country * * * are generally denounced as odious, intolerable, and contrary to public policy and common right. They are regarded as repugnant to the spirit of our government and institutions, and are frequently forbidden by constitutional as well as statutory enactment. Indeed, as the term is generally employed, injury to the public is implied from its use."

The common law, aside from statute everywhere, condemns monopolies as being contrary to public policy. Id. §5.

An arrangement is monopolistic if it even *tends* to control a given market.

> "If it tends to control the given market, it unreasonably affects competition and prices to the detriment of the public and is obnoxious to both the common law and the anti-trust statutes. The question to be resolved is, then, whether the given arrangement or combination is injurious in any perceptible degree to the public or to any considerable portion of it, in tendency or effect." 36 Am. Jur. Monopolies, etc. §5.

The Supreme Court says the pace at which the tendency advances is of no consequence. It is enough that the arrangement *tends* to monopoly. *International Salt Co.* vs. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

Every arrangement tending toward stifling of competition is denounced by the anti-trust laws.

> "Stifling or Suppressing of Competition.—Every contract, combination, or arrangement of which the direct purpose, probable effect, or necessary *tendency* is to stifle or unduly to restrict legitimate competition is unlawful at common law and under the anti-trust statutes. To be within the rule, it is not essential that the combination shall have been *successful* in suppressing competition; if the *tendency* of the arrangement has been to lessen competition in some degree, the conclusion is that it is unlawful." 36 Am. Jur. Monopolies, etc. §6. (Italics added.)

Furthermore:

> "All the authorities agree that in order to vitiate a contract or combination, it is not essential that its result be a complete monopoly; it is sufficient if it really *tends* to that end, and to the deprivation of the public of the advantages which flow from free competition." Id. §13. (Italics added.)

The Sherman Anti-Trust Act denounces as illegal: "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states" etc. 15 U. S. C. A. §1. Also, every monopoly or *attempt* at monopoly, thus:

> "Every person who shall monopolize, or *attempt* to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor. * * *" 15 U. S. C. A. §2.

The receipt and handling of livestock by the Denver Union Stockyard Company, at its "posted" stockyards as

one of the "great national public utilities" constitutes interstate commerce. *Stafford* vs. *Wallace*, 258 U. S. 495, 428 S. Ct. 397. 23 A. L. R. 229.

With the foregoing observations in mind let us proceed to examination of the Regulation here. Remember it says in effect: If you do business at our stockyard you may not do business in the country except to route business in that area to our yards. In other words, if you do business in the country except to ship livestock to us you will be expelled from our yards. This Regulation limits and unreasonably restrains all market agencies, such as Respondent, and dealers in their operations at the Denver Stockyard (interstate commerce operations) by denying them "stockyard services" (which the Packers and Stockyards Act vouchsafes) if they perchance deal at all (even at the stockyard)[16] respecting livestock in the country area without shipping to Denver. The market agencies and dealers admitted on (and thus engaged in interstate commerce at) the Denver Stockyards cannot handle any livestock from the forbidden country area nor buy or sell in that area without shipping to the Denver Stockyard; nor may they sell or ship from that area to other stockyards — Omaha, Kansas City, St. Louis, Chicago, etc. — under penalty of being expelled.

Freedom of competition is gone. The market agencies and dealers may no longer serve their patrons in a free market; rather, they and their patrons (both patrons within and patrons without the forbidden area, as well) are denied access (through the market agencies and dealers) to the Denver Stockyard if those agencies do not accede to the unwhole-

[16]The proscription applies "*upon the company property* or elsewhere." (P. 10.)

some demand of this Regulation. On the other hand, if the market agencies and dealers bow to its restraint, *monopoly* prevails. The design of the Regulation is to "capture"[17] the market — the market of all livestock originating in the country area in nearly all of Colorado passing through the hands of all market agencies and dealers who may do business on the Denver Stockyards. The design is subtle and the stockyard owners will vigorously deny all monopolistic purposes or tendencies. But the Regulation speaks for itself. It is one of monopoly. Today, it travels at a snail's pace — it only "creeps".[18] But another day it may switch to a gallop. But whether it creeps or gallops the *tendency* is clear — monopoly is in the making, incipient monopoly is there. Its tendency is enough. *International Salt Co.* vs. *U. S.*, supra.

That the Regulation's monopoly does not blanket the entire livestock marketing industry is of no consequence:

> "The statute prohibits the monopolization of 'any part of the trade or commerce'." *Kobe, Inc.* vs. *Dempsey Pump Co.*, 10 Cir., 198 F. 2d 416, 423.

The Regulation's evictive threat over the market agencies and dealers on the Denver Stockyard is exactly like the one stricken down for its monopoly power in *Gamco, Inc.* vs: *Providence Fruit & Produce Bldg.*, 1 Cir. 194 F. 2d 484. Cert. Den. 344 U. S. 817, 73 S. Ct. 11. Gamco, a fruit and vegetable dealer, was evicted from a market building which provided market facilities for fruit and vegetable dealers. The building and facilities were served by interstate railroads. Gamco's lease contained a regulation prohibiting any transfer of interest in the business without the consent of the market

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[17] *International Salt Co.* vs. *U. S.*, 68 S. Ct. 12, 15.

[18] *International Salt Co.* vs. *U. S.*, supra.

owner. Gamco's stock changed hands on non-payment of a pledge. It was then evicted. It sued for reinstatement at the market and treble damages. The Court of Appeals (1st Circuit) ordered Gamco reinstated at the market with treble damages. The Supreme Court denied review.

The trial judge had upheld Gamco's eviction because competition continued on the market regardless. In reversing, Judge Clark said:

> "But there are other indicia of monopoly power, of which exclusion of competitors from the market is one, *International Salt Co. vs. U. S.*, 332 U. S. 392, 396, 68 S. Ct. 12, 92 L. Ed. 20, which are condemned per se by §2, regardless of whether or not the position of dominance has been exploited to rig prices."

After extensive discussion the opinion on this subject concludes:

> "It is clear, from the various cases we have cited above, that exclusion from an appropriate market or business opportunity is actionable, notwithstanding substitute opportunities. * * *" (p. 488.)

Here Note: The produce market was *not* a public utility. The Denver Stockyard is.

The "substitute opportunity" offered by the Regulation here—freedom to deal at will in the country after the market agencies and dealers are excluded from the "appropriate market or business opportunities" of the Denver Stockyards —is no ameliorant. "Substitute opportunities" cannot be foisted upon a monopolist's victims.

This monopoly is condemned also by Colorado State Law. Remember, as we saw at the beginning of this chapter, monopolies are not denounced by Anti-Trust Statutes alone.

They were first condemned by the common law and remain repugnant in its eyes. 36 Am. Jur., Monopolies, etc., §3. §5. Any arangement which *tends* to stifle competition is unlawful by the common law. Colorado law denounces restraints and monopolies within its borders. In *Burns* vs. *Wray Farmers Grain Co.* (Colo.) 176 P. 487 (1918) the members of a farmer's grain association were allowed by a regulation in the by-laws to sell their grain to competitors in the Town of Wray *only* if they paid the Association a penalty. The Colorado Supreme Court held the by-law was in restraint of trade, explaining:

> "From the agreed statement of facts filed in this case the *tendency* of the by-law to stifle competition is manifest. It is practically impossible for a competitor of the plaintiff company in Wray to secure the patronage of the 230 existing stockholders in the grain company. * * * If these farmers do not want to sell their grain to their own company, they are allowed to sell to any competitor outside of Wray, but not to any competitor in Wray, unless they pay the penalty * * * it follows that they will not sell to a competitor in Wray unless they receive 1¢ or more per bushel more than what is offered by their own company. The competitor must offer this additional amount or else lose the business. The by-law if enforced, unquestionably would *tend* to drive out of business any other grain buyer in Wray and give the plaintiff company a monopoly. This effect renders the by-law unreasonable.
>
> "There is another feature of the by-law which makes it unreasonable. That is its restriction upon the stockholders themselves. They are restricted in their right to sell their product to whomsoever they please, and there is an absence of circumstances which render such restriction necessary for their own protection. According to the by-law, they are required

to sell to no grain buyer in Wray, which is their nearest and most convenient place of market, except to the Wray Farmers Grain Co. If they violate this agreement they are subject to the penalty prescribed in the by-law.

"The unreasonableness in the two respects above noted is due to the resulting injury to the public, which injury is *assumed* to exist or be inflicted under the circumstances of this kind according to the well-settled doctrines having to do with public policy." (Italics added.)

See also *Campbell* vs. *People* (Colo.) 210 P. 841 and *Johnson* vs. *People*, (Colo.) 210 P. 843 which outlawed monopolies of plumbers and electrical contractors.

True, exclusive patronage and penalty contracts between agriculturists and their associations (which were outlawed by the Colorado Supreme Court in the *Burns* vs. *Wray* case) are now valid in Colorado. But that was later brought about by a specific act of the Colorado Legislature approving that single class of restraints in 1923. See *Rifle Potato Growers Coop Assoc.* vs. *Smith* (Colo.) 240 P. 937 (1925). But the Colorado law still condemns monopolies and restraints except of the type specifically exempted by the remedial act above. See *Colorado Wheat Growers Assoc.* vs. *Thede* (Colo) 253 P. 30 (1927).

The arbitrary regulation spells only obstruction and restraint. Farmers and ranchers, the owner-members and patrons of Respondent and other market agencies in the forbidden area—and all other farmers and ranchers therein as well—are arbitrarily restricted and restrained in their opportunities for marketing their livestock. For this unwholesome regulation denies them marketing service through their own

market agencies or other agencies or dealers of their choice, except at Denver, if those agencies or dealers bow to its demand. On the other hand, if the agencies refuse to abide the regulation and decide to serve their patrons elsewhere, then the farmers and ranchers in the forbidden area may not, through their chosen agencies, go to market at the Denver yard because those agencies will have been evicted.

The result:

(1) Only those agencies who curtsy to the regulation and limit their marketing thereto will be allowed to take their patrons' livestock to the Denver Stockyard.

(2) Only those agencies who are willing to abandon trading on the Denver Stockyard will be allowed to take their patrons' livestock elsewhere to be marketed.

The first mentioned agencies will not vie for country sales or other markets for their customers under threat of reprisal by expulsion from the Denver Yard; while the second mentioned will not be able to market their patrons' stock at the Denver Yard because they will not be allowed to enter there. And thus a marketing pattern will emerge by which all livestock in the forbidden area will move in strict stereotype fashion—to Denver, only through the agencies who are willing to forget country operations on behalf of patrons except to ship to Denver; to other points and elsewhere, only through the agencies who are willing to forego operations for patrons at the Denver Yard. The livestock growers hitherto being free to direct their selected agents to take their product to Denver or to any other market—or even direct them to dispose of it directly in the forbidden area—will now have no such freedom. The class will be narrowed both

ways. They must choose only qualified agencies if they turn to Denver; only other agencies if they look elsewhere.

Furthermore, to the extent that it *forces* those market agencies and dealers who stay on at Denver to take their patrons livestock there, the Regulation monopolizes "that part"[19] of the business of marketing livestock and is unlawful.

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[19]The Sherman Act condemns monopoly or attempts at monopoly of "any part" of trade or commerce. 15 U. S. C. A. §2.

6.

THE REGULATION IS INVALID UPON ITS FACE.

We have seen that the Packers and Stockyards Act commands Denver Union Stockyard Company to furnish Respondent and other market agencies "stockyard services without discrimination" and declares that every unjust and "discriminatory regulation" is unlawful. 7 U. S. C. A. §205. §208. This in effect makes the Stockyard Company a public utility.

The Regulation in suit demands (1) the exclusive patronage of Respondent and all market agencies and dealers who are admitted on the Denver Stockyard, and, (2) forbids their dealing in the country area of Colorado other than to route their deals to the Denver Yard. But as we have seen (1) public utilities may not demand exclusive patronage by their patrons, nor, (2) deny them service because of some collateral matter not related to the service.

One look at the Regulation is enough. Its exclusive patronage demands are apparent *on its face*. Its denial of stockyard services to all market agencies and dealers who may unqualifiedly deal in the forbidden country area is likewise apparent *on its face*. That it *forces* all to whom it furnishes stockyard services to route their country business from the area noted to the Denver Yard is apparent *on its face*. Its announcement, as against the avowed public purpose of this act, that it will furnish stockyard services to handle the farmer's product on its way through that "great national public utility" to the consumers only if and when it is handled by an agency who agrees to send all of its patrons' prod-

ucts to Denver, is sardonic. Restraint and monopoly clearly show *upon its face*. The purpose of the stockyard owners to "monopolize or attempt to monopolize"[20] the movement of livestock from the forbidden area by this ingenious regulation is apparent *on its face*.

The regulation, we submit, is clearly illegal upon its face.

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[20]Sherman Act. 15 U. S. C. A. §2.

7.

SINCE THE REGULATION IS INVALID ON ITS FACE "FULL HEARING" REQUIRED NO EVIDENCE.

We wish to point out the Petitioners' (and their Amicus') misconception of the "full hearing" provision of the Act. It provides "Whenever after full hearing upon a complaint * * * the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary (may make a cease and desist order, etc.)". 7 U. S. C. A. §211.

We have seen already that the Regulation here, as shown upon its very face, is illegal for exacting (on its face) in behalf of the Denver public utility stockyard, exclusive patronage and consent to non-activity in the forbidden country area (a collateral matter) on the part of the market agencies and dealers whom the Act commands the Stock Yard Company to serve without discrimination; also, for its "attempt" (upon its face) to monopolize" the marketing of livestock contrary to the anti-trust laws of the United States and Colorado.

Being invalid on its face, no evidence was necessary. The Regulation could not have been "legalized" by any proof and no order by the Secretary could have made it valid.[21]

[21]"It could not have been legalized by any proof nor could the Commission by any order have made it valid." *Pennsylvania Railroad Company* vs. *International Coal Mines Company*. 230 U. S. 184. 33 S. Ct. 893, 896. Those were the words of the Supreme Court in rejecting a contention that a claim for partial rebate of freight rates should be submitted to the Interstate Commerce Commission for a *fact* hearing so as to allow that body to exercise its rate-regulating discretion because of the Railroad's practice of making similar rebates to other shippers.

Remember, both the Marketing Association and the Stock Yard Company submitted the Regulation for decision upon its *face*.[22]

The Marketing Association's "Election to Rest" said the Regulation was invalid upon its *face* as a matter of *law*, stating, consequently, that it would present no evidence (R. 72). The Stock Yard Company's "Motion to Dismiss" (R. 73) then demanded dismissal of the Marketing Association's complaint, *with prejudice*, contending the Regulation *was* valid in law upon its *face*, stating (in effect) that it, too, would not present evidence. The Secretary decided the case in that posture and upheld the Regulation on its *face*. The Court of Appeals accepted that same posture and found (as it was thus bound to do) that no fact issue existed and that "full hearing" had been accorded by a hearing of the Regulation on the law:

> "Where no genuine or material issue of fact is presented the court or administrative body may pass upon the issues of law after according the parties the right of argument. This was done in the instant case and constitutes a "full hearing" for consideration of the limited contention made by the petitioner in its complaint and by its election not to submit evidence" (R. 81-2): 241 F. 2d 196.

The face of the Regulation showed it was illegal. A full hearing on that was had as the Record shows (R. 10, 11):

—Oral argument before a hearing examiner.

—Briefs were submitted to him.

—Respondent filed its Election to Rest, submitting the case on the illegality as shown by the Regulation itself.

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[22]That was by the Marketing Association's "Election to Rest" and the Stock Yard Company's corresponding "Motion to Dismiss". That was the posture in which the case was decided. See P. 6.

—The Stock Yard responded with a Motion
Dismiss.

—The hearing examiner certified the proceedi
to the judicial officer.

—Numerous *amici curiae* were permitted to
briefs before that officer.

—The parties also filed briefs with him.

—Oral arguments were held before the judic
officer finally April 30, 1956.

In this posture, the full hearing requirement appl
only to the Regulation's invalidity as a matter of *law*. Bo
sides were willing to settle for that result. Respondent rest
The Stock Yard Company rested by its Motion to Dism
At that juncture, the uestion for decision was: validity
invalidity of the Regulation upon its face as a matter of la
A full hearing was held on that question. The Secreta
might decide either way. Whatever he thus decided, the f
hearing provision was fully complied with and exhaust
The Petitioners' erroneous position would require a heari
upon any and every Regulation, no matter how palpably
ridiculously illegal it might be. For example, that only
following should be admitted to do business on the Den
Stockyard:

—Redheaded men, or,

—Residents of Chicago or San Francisco, or,

—Stockholders of General Motors Corporati
or,

—Stockholders of American Tel. & Tel. Co.,[23]

—Members of the Republican Party, or,

—Members of the Methodist Church, etc., et

[23]The Supreme Court recently used examples 1 to 4 above in quot
from the 9th Circuit in *Securities and Exchange Commission* vs. *Rals*
Purina Co., 346 U. S. 119. 73 S. Ct. 981.

Would it be necessary to hold a hearing on facts about redheaded men, residents of Chicago or San Francisco, or stockholders of General Motors or American Tel. & Tel. Company? Of course not. No hearing could possibly add anything. In the words of the Supreme Court, it would be a "waste of time".[24]

Or, suppose the Stock Yard Company were to rule that no commission man could on the Denver Stockyard:

—Sell milk cows if he drank powdered milk,

—Sell beef cattle if he also sold fish or poultry,

—Sell sheep with unshorn wool if he dealt in cotton,

—Sell draft animals if he drove a truck, or

—Sell hide-animals if he wore synthetic shoe soles.

Petitioners contend even more. They argue the Court of Appeals' decision denouncing the Regulation upon its *face* is iniquitous for its effect, they predict, on rate-inquiry proceedings before the Department of Agriculture over the "reasonableness" of "rates" at stockyards. Apparently, their view is that in any and every "rate" case, resort to a *fact hearing* is necessary to determine "reasonableness" of stockyard rates and that a stockyard tariff fixing "rates" could never be "unreasonable" on its face. That illogical concept would lead to the ridiculous end that a tariff which might

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[24] *United States* vs. *Storer Broadcasting Company*, 351 U. S. 192. 76 S. Ct. 763, 772. See also *American Sumatra T. Corporation* vs. *S. E. C.* (D. C. Cir.) 93 F. 2d 236, 239, where it was said: "In such cases, it would be a waste of time to require one (a hearing)".

demand the following "rates" for stockyard services would require a fact hearing to determine its invalidity:

—One pair of cowboy chaps (or one "ten-gallon" cowboy hat or one pair of cowboy boots) for every 10 cows entering the stockyard.

—One cow for every 100 head of cattle entering the stockyard.

—One smoked ham for every 10 pigs entering the stockyard.

—One wool shirt for every 10 sheep sold at the stockyard.

—One riding saddle for every 10 horses sold at the stockyard.

—*Twice* the above rates to redheaded men, residents of Chicago or San Francisco, or stockholders of General Motors Corporation or American Tel. & Tel. Co.[25]

While the invalidity of such rules upon their face would be self-evident, Petitioners (and their amicus) would argue that a hearing and evidence should be had to establish the invalidity of such things. But that, of course, would be a "waste of time".

But we think the matter is at rest by the recent (May, 1956) decision of the Supreme Court construing identical "full hearing" language of the Federal Communications Act. *United States* vs. *Storer Broadcasting Co.*, 351 U. S. 192, 76 S. Ct. 763. That Act requires a "full hearing" on applications before the Federal Communications Commission. 47 U. S. C. A. §309. The Commission issued a rule relating to multiple ownership of broadcast stations which limited the

[25]To refer back to the Supreme Court's example adopted in *Securities & Exchange Commission* vs. *Ralston Purina Co.* P. 50, supra.

number in the hands of one owner. One broadcaster filed objections on the principal ground that the rule denied one person as many FM and television stations as standard stations. But the Commission upheld the rule. The Supreme Court affirmed. The broadcaster argued that the rule's denial could not become effective prior to a full hearing on his objection. But the Supreme Court said:

> "We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing." 76 S. Ct. at page 772.

Here the Regulation is invalid on its face. Taking evidence when the result was clear from the beginning was wholly unnecessary. There was no "valid basis" for a hearing of evidence. It would have been a "waste of time". The full hearing provisions were met and satisfied, as the Court of Appeals ruled, by the hearing, arguments and briefs before the Secretary on that question of law. Cases cited by Petitioners are not in point.[26]

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[26]For example, *Morgan* vs. *United States*, 298 U. S. 468. 304 U. S. 1, was upset by this Court because of the startling procedure employed. The Secretary (who took office after the case was commenced and heard none of it) made the decision after his deputy (Rexford G. Tugwell) heard the evidence. That was *not* "full hearing".

8.

AS SHOWN BY OUR OPPONENTS' BRIEFS, MARKETING AWAY FROM THE STOCKYARDS IS NOW OVER 40 PERCENT.

The above shows the magnitude of the off-yard or country marketing of livestock nowadays. Brief of Petitioners' Amicus (American Stock Yards Association) shows a report by the Commitee on Agriculture, House of Representatives, 85th Congress, that while less than 10 percent of livestock were marketed or sold in the country when the Act was passed in 1921, now the amount exceeds 40 percent. In other words, nearly one-half of all livestock sales are now made away from the stockyards. (Amicus Brief, American Stock Yards Association, P. 24.)

This shows the tremendous effect this Regulation was probably designed to accomplish—to force back through the Denver yard most of the 40 percent of livestock sales in Colorado which are now made in the country.

9.

PETITIONERS' AUTHORITIES EXAMINED AND FOUND WANTING.

Reference should be made to two decisions which the Stock Yard Company claims support its position here—Fort Worth and Sioux City Stock Yard cases. At Fort Worth, a Texas intermediate appellate court (Texas Court of Civil Appeals) enjoined activities by defendants *not* out in the country away from the stockyard but actually in the alleys on the stock yard company property itself.[27] The Texas Court stated the stock yard company's complaint thus:

> "That defendants, against the will and over the protests of plaintiffs, persisted in going on plaintiff's property in said alley-way which leads to plaintiff's pens and docks, and there accosted drivers of trucks and loads of livestock on their way to plaintiff's pens, stopping said trucks and trailers in said driveway, and often buying said livestock before they reached plaintiff's pens; that when said trucks and trailers were so stopped, it caused a congestion of traffic and endangered life and property, since several hundred such trucks and trailers passed through said driveway each day" etc.

Continuing:

> "* * * that in many instances, defendants then and there in the midst of all said traffic and customers on their way to plaintiff's docks, would unload said livestock from the original owners' trucks and trailers to those of defendant's, thereby stopping traffic and increasing the inconvenience to plaintiff and its customers and patrons." *Fort Worth Stock Yards Company* vs. *Brown* (Texas) 161 S. W. 2d 549.

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[27]The opinion states the defendants were in fact trespassers on the Fort Worth Stock Yard property.

No one, we think, will contend against a stock yard company's right to preserve the peace and avoid traffic jams in the stockyards—throughout its alleys, pens and docks. But that is not to say that the Fort Worth Stock Yard Company could lawfully say to those who were admitted at its yard:

> "If you do business on our stockyard, you may not do business outside or in the country."

The Court of Appeals in our case held the Stock Yard Company could not do so. The Tennessee Supreme Court held likewise years ago.[28]

At Sioux City, the right of the Secretary of Agriculture to examine a "dealer's" books recording his receipts of cattle at that stockyard was upheld notwithstanding he had subsequently transferred the cattle to a "special account" of his "off-yard" operations. The Court of Appeals (8th Cir.) referred to that simply as:

> "* * * transferring such cattle from himself to himself."

and said the Secretary of Agriculture acquired jurisdiction over the dealer's activities in connection with the cattle—

> "* * * when they arrived at the Sioux City Stockyards * * * That jurisdiction was not and could not be divested simply by the making of entries reciting that they had been transferred to his 'special account'." *Woerth* vs. *United States*, 8 Cir., 231 F. 2d 821, 824.

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[28] *Nashville Union Stockyards* vs. *Grissim*, 153 Tenn. 225. 280 S. W. 1019. See Page 25.

10.

REGULATIONS AT OTHER STOCKYARDS ARE UNLIKE THE DENVER REGULATION.

Petitioners' Amicus Curaie (American Stock Yards Association) has traveled in a wide excursion outside and beyond the record here. Its brief contains a 30-page appendix of selected *portions* of alleged regulations at other stockyards. Examination shows only 3 as set out in that brief compare with Denver's Regulation, and that all of those were adopted *afterward*:[29]

Baltimore	—	August 8, 1955
Houston	—	July 15, 1955
Los Angeles	—	May 25, 1955[30]

Regulations adopted *after* the Denver one and not shown to have been litigated are obviously of no use in deciding the Regulation's validity. Apparently, we think, their authors must have taken their cue from Denver.

On the other hand, all other alleged regulations in the the brief (appendix) of Amicus, American Stock Yards Association (to the extent of the portions *selected* for quotation there) catalog themselves into a single pattern, provid-

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[29]The Denver Regulation was adopted May 11, 1955 (R. 39).

[30]American Stock Yards Association's brief is in error in stating the Los Angeles Regulation was February 10, 1957. The Department of Agriculture's records will show it was May 25, 1955. It is also on trial before the Secretary of Agriculture, awaiting the outcome of this case. *Producers Livestock Marketing Association* vs. *Los Angeles Union Stockyards Company*. U. S. Department of Agriculture, Packers & Stockyards Docket No. 2188.

The San Antonio Regulation applies only on the stockyard property.

ing, in substance, like Salt Lake City's (the home office of Respondent):

> "No market agency, dealer, or their employees shall solicit, or otherwise interfere with, the owners, drivers, attendants of incoming rail, truck, wagon or drive-in stock upon the streets adjacent to or upon the property of this Company prior to delivery into holding pens, without express permission." (Brief, American Stock Yards Association, Appendix, 24a.)

To the same effect, see: Cincinnati, Detroit, Fargo, Fort Worth, Milwaukee, Omaha, Peoria, Portland, St. Joseph, St. Paul, San Francisco, Sioux City, Sioux Falls and Wichita. (Brief of Amicus, American Stock Yards Company.)

The few regulations like Denver's (Baltimore, Houston and Los Angeles) came *after* the Denver one. (Los Angeles' is in litigation, as we have shown, before the Secretary of Agriculture. See P. 4 herein.) The other two have not been tested. Other regulations cited by the Amicus (American Stock Yards Association) are altogether unlike Denver's.

11.

THE PRESENCE AND POSITION OF THE SECRETARY OF AGRICULTURE HEREIN IS ANOMALOUS.

The Secretary of Agriculture did *not* issue or prescribe the Regulation on trial. It was issued by the Denver Union Stock Yard Company.

The Secretary of Agriculture did *not* file or initiate any complaint or proceeding thereunder. This Respondent (Producers Livestock Marketing Association) did.

This was a private two-party action between two litigants—Producers Livestock Marketing Association, complainant (plaintiff) in the complaint before the Secretary, and Denver Union Stock Yard Company, respondent (defendant) in that complaint.

This is *not* a case where a Government officer or agency issued a complaint or seeks enforcement.[31]

The Secretary of Agriculture got into this case as a *forum* or tribunal only. He was made a party on appeal to the Court of Appeals only because the rules of that Court required it.[32] Otherwise, he would have been left out, for the Hobbs Act (governing appeals from the Secretary of Agriculture to a Court of Appeals) provides that only the United States shall be the respondent on appeal.[33]

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[31]For example, not like the National Labor Relations Board's issuing a complaint for unfair labor practices. 29 U. S. C. §160. Nor did the Secretary, himself, commence this case "on his own initiative", as permitted by the Packers & Stockyards Act. 7 U. S. C. A. §211. *Respondent* filed the complaint before the Secretary.

[32]Rule 34(1) Revised Rules, Court of Appeals, 10 Cir. "In each case, the agency * * * or officer concerned shall be named as respondent."

[33]"The action in Court (of Appeals) shall be brought against the United States." (Parentheses added.) 5 U. S. C. A. §1034.

But now the Secretary—the *forum* or *tribunal*—appeals. He was only a *nominal* party in the Court of Appeals; joined only because of a Rule of that Court.

Actually, this is still simply a private, two-party suit between the original litigants—Producers Livestock Marketing Association and Denver Union Stock Yard Company. The presence and position of the Secretary of Agriculture in this case is entirely anomalous.

CONCLUSION

By now, the purpose of the Stock Yard Company's startling Regulation must be obvious to this Court—*Monopoly.*

> To force all livestock sales by market agencies and dealers in Colorado (except the East one-sixth) to be made through the Denver Stockyard or to gather *tribute* on them.

Argument without end, the design for monopoly stands out in bold relief against all the explanations and excuses the Stock Yard Company can make.[34]

Years ago at Nashville, the stock yard owners tried without success to rule off a commission firm for doing business outside the stockyards. It was "diverting"[35] business from the yards and that was "hurtful"[36], it was charged. But the Tennessee court "found nothing in the Act" requiring one to do all his business on a stockyard. *Nashville Union Stockyards* vs. *Grissim* (Tenn.) 153 Tenn. 225, 280 S. W. 1015. (See pp. 14, 25 herein.)

Now, at Denver the stockyard owners have determined to succeed where Nashville failed. The substance of their purpose — *monopoly* — is still the same. They have only changed its form. Their design is subtly cloaked by Regulation where Nashville's was unclothed in that respect. If

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[34]The Court of Appeals declared the Regulation "unlawfully * * * wounds the public interest" (R. 83). 241 F. 2d 196.

[35]The Denver Regulation uses the same language. It says no market agency, etc. may "*divert* or attempt to *divert* livestock from this market" (R. 39). P. 10, supra.

[36]In our case, the Court of Appeals below observed that the Denver Stock Yard Company may not exclude agencies from the yard simply because they may "lawfully trod upon its economic toes" (R. 82). 241 F. 2d 196.

Denver's Regulation is upheld by this Court, its success, we submit, will surely incubate an outbreak of similar regulations at all the stockyards throughout the United States. Los Angeles has already regulated, as we saw earlier in this brief (P. 4).. There will be nothing to stop the others. The vast number of livestock growers and farmers who have long comprised and patronized Respondent and similar livestock marketing organizations will be denied the service of their chosen agencies at the stockyards wherever those "great, national public utilities" determine to ban agencies for off-yard trading. That, we submit, is against the salutary purposes of the Packers & Stockyards Act which makes it the duty of every stockyard owner to furnish stockyard services "without discrimination" and denounces as unlawful "every unjust, unreasonable and discriminatory regulation and practice".

Respondent, Producers Livestock Marketing Association, submits:

1. The Stock Yard Company as a public utility is under duty to furnish Respondent and other market agencies and dealers stockyard services without discrimination.

2. The Regulation is illegal for demanding the exclusive patronage of those agencies and dealers.

3. The Regulation is illegal for denying stockyard services to those agencies for dealing in the country area—a *collateral* matter which will not justify denial by a public utility.

4. The Regulation is illegal for being *monopolistic*, "tending" and "attempting" to monopolize the marketing, by the market agencies and dealers who do business at the

Denver yard, of livestock originating in the forbidden area, contrary to the laws of the United States and the State of Colorado.

5. The Regulation is invalid upon its face.[37] Since its invalidity is thus apparent, a "full hearing" required no evidence to establish that it was illegal. "Full hearing" was required only upon the "issues of law",[38] resulting by Respondent's "Election to Rest" and the Stock Yard Company's "Motion to Dismiss", as the Court of Appeals properly held.

6. Decisions cited by the Stock Yard Company—Fort Worth and Sioux City—are not in point. At Fort Worth, *trespassers* were enjoined from jamming the alleys and ways on the stockyard property and from there "accosting" drive-in loads of cattle and taking them away. At Sioux City, a "dealer" was ordered to submit (to the Secretary of Agriculture) his records of livestock purchased at the yard (which gave the Secretary jurisdiction originally). The records were not immune from official scrutiny, it was held, simply by the dealer's transferring the purchased cattle "from himself to himself" in a "special" off-yard account. (See P. 56.)

7. Regulations at other stockyards differ vastly from the one on trial. Their proscriptions are against offending activities carried on at the yard—in the stockyard ways, alleys and pens, or along approaches to the yard. The few regulations (like Los Angeles still on trial before the Secretary of Agriculture) having similarity to Denver's came *after* the Denver one and appear to have been inspired by it.

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[37]For examples of rules and regulations by utilities showing *exclusive* patronage demands and *monopoly* upon their face (and stricken down by the courts), see pages 27-30 herein.

[38]Opinion below (R. 81). 241 F. 2d 196.

8. The presence and position of the Secretary of Agri culture on this appeal is anomalous. He got into the cas only as a forum or tribunal and remains simply *per force* o a Rule of the Court of Appeals requiring that he be name as party in that Court. His presence here is purely *nomina* The *real* parties in interest are Respondent, Producers Live stock Marketing Association, and Petitioner, Denver Unio Stock Yard Company.

9. The judgment of the Court of Appeals holding th Regulation to be illegal and invalid upon its face as a matte of law, and reversing the decision of the Secretary, is correc and must be affirmed.

November, 1957.

Respectfully submitted,

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